

REPUBLIC OF ALBANIA
-COMPETITION AUTHORITY-
COMPETITION COMMISSION

DECISION

No. 419, Date 08.06.2016

On approval of the directive “On simplified procedures for the assessment of some concentrations”

Competition Commission, with participation of:

- Mrs. Lindita Milo (Lati) Chairperson
- Mrs. Servete Gruda Vc. Chairperson
- Mr. Koço Broka Member
- Mrs. Iva Zajmi Member
- Mr. Eduart Ypi Member;

In the meeting dated 08.06.2016, addressed the issue with

Object: Review of draft directive “On simplified procedures for the assessment of some concentrations”, in accordance to Law no. 9121, date 28.03.2003 “On Competition Protection” (amended), and Regulation “On the implementation of procedures for concentrations of undertakings”.

Legal Framework: Law no. 9121, dated 28.7.2003 "On Protection of Competition", Article 24, letter d),dh), and Regulation “On the implementation of procedures for concentrations of undertakings”

Competition Commission after reviewing the draft directive “On simplified procedures for the assessment of some concentrations” and the report of the General Secretary:

DECIDED:

1. To approve the Directive “On simplified procedures for the assessment of some concentrations”.
2. This Directive was drafted, by being approximated and adapted with EU’s “Commission Notification on simplified procedures for assessing some concentrations according to European Council (EC) reregulation no. 139/2004 (52013XC1214(02) (2013/C 366/04)”
3. This decision comes to power immediately.

Directive

“On short-form procedures on the assessment of concentrations¹”

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I. Introduction

1.1 Objective and Scope

1. This directive aims to establish a short-form procedure under which the Competition Authority intends to treat certain concentrations under Law no. 9121, dated 28.7.2003 "On Protection of Competition", (as amended), based on the fact that they do not raise competition concerns.

The experience gained by the Competition Authority in the implementation of the Regulation "On the implementation of the concentration procedures of enterprises", has shown that certain categories of notified concentrations are normally authorized without substantial doubts raised regarding the situation of the competition in the market.

2. The purpose of this guideline is to determine the conditions under which the Competition Commission adopts a final decision declaring the concentration compatible with the internal market and in accordance with the procedure itself. When the necessary conditions laid down in paragraphs 2.1, points 1 and 2 of this Directive are met and there are no special circumstances, the Commission adopts a final short-form decision within 25 days of confirmation of the filing of the complete documentation of notification under Regulation "on the implementation of the concentration procedures of enterprises", Article 7 "obligation to notify the concentration".
3. However, the Competition Authority, at any stage of the proceedings, when it deems it necessary, can initiate an investigation procedure and / or take a full decision under the Regulation "On the implementation of the concentration of undertakings procedures".

¹ Commission Notice on short-form procedures in the treatment of certain concentrations under Council Regulation (EC) No 139/2004 (52013XC1214 (02) (2013 / C 366/04)

II. Categories of Concentrations that qualify for short-form procedures

2.1 Categories of Concentrations

1. Competition Authority applies the short-form procedure for each of the following concentrations²:
 - a) two or more undertakings acquire joint control of a joint venture (JV), provided that the joint venture has no, actual or anticipated activities to have, in the Republic of Albania;

Such cases occur when:

- Turn the joint venture and / or³ activities contributing turnover is less than 300 million ALL in the territory of the Republic of Albania at the time of notification⁴;
 - The total value of assets transferred to the joint venture is less than 300 million ALL in the territory of the Republic of Albania at the time of notification⁵.
- b) two or more undertakings merge, or one or more undertakings gains sole control or joint another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographic market, or in a product market, which is upstream or downstream market, a product market in which any other party to the concentration is engaged⁶.
 - c) two or more undertakings merge, or one or more gain sole control of an enterprise or joint company and when the two following conditions are met:
 - the combined market share of all the parties to the concentration, dealing with business activities in the same product and geographical market (horizontal relationships) is less than 15%.
 - individual parts or combined market of all parties to the concentration, that deal with activities, business in a product market which is a market upstream or downstream from a product market in which any other party to the concentration is engaged (vertical relationships) are less than 25%.
2. The Competition Authority may also apply the short-form procedure where two or more undertakings merge, or one or more enterprises take sole control or joint another undertaking, and when both of the following conditions are met:

² The following categories apply as an alternative, not cumulative, d.m.th fulfilling all the criteria of any of the categories mentioned in paragraph 2.1, paragraph 1 (a), (b), (c) or (d) or 2 points. A transaction may meet the criteria for more than one of the categories described in this notice. Therefore, the notifying parties can file a notice of a transaction on the basis of more than one of the categories described

³ The expression 'and / or' refers to a variety of situations; for example:

- In the case of joint acquisition of a company, the turnover to be taken into account is the turnover of their (the joint venture)
- In the case of establishing a joint venture to which the parent companies contribute their activities, the turnover taken into account is that of the contributed activities,
- In the case of entry of a new controlling party into an existing joint venture, to be considered the turnover of the joint venture and the turnover of the activities contributing new parent company (if any)

⁴ The turnover of the joint venture can be determined based on the audited accounts (the times fundit0 parent companies or the joint venture, depending on the availability of separate accounts for the resources combined in the joint venture.

⁵ The total value of assets of the joint venture can be determined based on the last balance sheet of each parent company. The term 'assets' includes: (i) all assets and tangible and intangible assets which will be transferred to the joint venture (examples of tangible assets include production plants, wholesale or retail, and inventory of goods; examples intangible assets include intellectual property, goodwill, etc.), and (ii) any amount of credit or any obligations of the joint venture.

⁶ Usually a vertical relationship presupposes that the product or service company active in the upstream market constitutes an important contribution to the product or service company active in the downstream market

- combined market share of all the parties to the concentration, that are in a horizontal relationship is less than 50%; and
 - Increase (delta) of the Herfindahl-Hirschman Index (HHI) resulting from the concentration is below 150.
3. For the implementation of paragraph 1 (b), 1 (c) and 2 of Chapter II / 2.1, in case of acquisition of joint control outside the scope of activity of the joint venture, the relationships that exist between undertakings acquiring joint control, not vertical or horizontal considered for purposes of this chapter.

2.2 Protective measures and exemptions

1. In assessing whether a concentration is within the scope under paragraphs 1 and 2 of Chapter II / 2.1, the Competition Authority will ensure that all the circumstances are sufficiently explained. Given that market definitions are likely to be a key element in this assessment, the parties should provide information for all possible alternative definitions of the market in general during the pre-notification. Notifying parties are responsible for describing all alternative relevant product and geographic markets in which the notified concentration could have an impact and for providing data and information relating to the definition of such markets⁷. The Competition Authority has the right of final decision on the definition of the market, and bases its decision on facts analysis of each case.

If it is difficult to determine the relevant market or to determine the parties' market shares, the Competition Authority will not apply the short-form procedure. Also, based on the extent that concentrations involve new legal issues of general interest, the Competition Authority would normally abstain from the shortened form, and normally will return to a normal procedure of concentration in the first phase.

2. While it can be assumed that concentrations are within the scope under paragraphs 1 and 2 of Chapter II / 2.1, and do not bring serious doubts regarding their compatibility with the internal market, there may be certain situations that require an inquiry and / or a full decision. In such cases, the Competition Authority may revert to the normal procedure of concentration in the first phase.

The following are indicative examples of cases that can be excluded from the short-form procedure.

3. The Competition Authority is less likely to accept a proposed concentration under the short-form procedure, if any of the special circumstances mentioned in the Instruction "On the assessment of horizontal mergers" are present. This includes cases where the market is already concentrated, where the proposed concentration would remove an important competitive force or where the proposed concentration would combine two important innovators / inventors.
4. The same method can be applied when it is not possible to determine the precise market parts of the parties. This can be the case when the parties operate in new or less developed market.
5. Certain types of concentrations may increase the strength of the parties in the market combining technological resources, financial or otherwise, even if the parties in the concentration do not operate in the same market. Concentrations where at least two parties

⁷ As with all other notifications, the Competition Authority may revoke the short-form decision if it is based on incorrect information for which one of the undertakings concerned is responsible

in the concentration are present in markets closely related or neighboring⁸ may be unsuitable for the short-form procedure, in particular, where one or more of the parties to the concentration individually holds a market share of 25% or more in any product market in which there is no horizontal or vertical relationship between the parties but which is a neighboring market to a market where another party is active.

6. The Competition Authority may consider it appropriate to conduct a thorough evaluation according to the normal procedure of concentration, cases of joint enterprises with a turnover below the threshold specified in paragraph 1 (a) at the time of notification, but that can be expected that significantly exceed that threshold on the market within the next 3 years. In cases falling within the scope according to section 1 (a) of Chapter II / 2.1, a normal procedure may be considered appropriate if the relationship has horizontal or vertical lines between the parties to the concentration on the basis of which cannot be excluded the fact that the concentration would bring serious doubts regarding its compatibility with the internal market or if any of the particular circumstances set out in section 3 of Chapter II / 2.2, are present.
7. Experience to date has shown that a change from joint control to sole exception may request the full investigation and / or a full decision. Particular competition concerns may arise in circumstances where a former joint venture is integrated into a group or network that has remained in control of the sole shareholder, constraints exercised by shareholders controlling different are moved and its strategic market position can be strengthened. For example, a scenario in which undertaking A and undertaking B jointly control a joint venture C⁹, a concentration under which A provides control of only the C's can cause concerns for competition in circumstances in which C is a direct competitor's, where C and a will hold a significant position in the market combined, and where it removes a degree of independence, previously owned by C. In these cases, where such a scenario requires a deeper analysis, the Competition Authority may carry out a normal procedure concentration¹⁰.
8. In the case of concentrations described in paragraph 2 of Chapter II / 2.1, Competition Authority will decide case by case whether, based on the particular circumstances of the case, increasing the level of market concentration indicated by delta HHI is such that the case should be examined under the normal procedure of concentration.
9. If a third party expressed concerns within the time limit set for such comments, the Competition Authority will perform the normal procedure of concentration.

III. Procedural Disposition

3.1 Preliminary Notification

1. The Competition Authority considers important advance notice between notifying parties and the Competition Authority on a voluntary basis useful in cases that seem non-problematic. In some cases, the short-form procedure may raise complex issues, for example the definition of the market, which should preferably be resolved prior to the notice. Prior notification, allows the Competition Authority and the notifying parties to determine the exact amount of information that must be provided in a notice. The notifying parties are encouraged in particular to deal with prior notice when they want to ask the Competition

⁸ Product markets are closely related neighboring markets when the products are complementary to each other or when they belong to a range of products that is generally purchased by the same customers for the same end use

⁹ Case COMP / M.5141 KLM / Martinair, 17.12.2008, recitals 14-22

¹⁰ Case COMP / M.2908 Deutsche Post / DHL (II), 18/09/2002

Authority to apply the short-form procedure in the situation described in paragraph 2 of Chapter II / 2.1. According to the Regulation "On the implementation of the concentration procedures of enterprises", the notifying parties have the right to notify a concentration at any time, provided that the notification is complete. Possibility of prior notification is a service provided by the Competition Authority to the notifying parties on a voluntary basis in order to prepare the formal procedure of concentration. As such, although not mandatory, advance notice can be extremely valuable to both the notifying parties and the Competition Authority in determining the precise amount of information required in a notification and, in most cases, will result in a significant reduction of the information required.

2. However, prior notification, in particular the deposition of a draft notice, may be less useful in cases under paragraph 1 (b) of Chapter II / 2.1, than in cases where no markets reporting because the parties are not engaged in business activities in the same product or geographical market or in a market which is upstream or downstream, from a product market in which any other party to the concentration is engaged. In such circumstances, the notifying parties may prefer to notify immediately without depositing a prior notification draft.
3. The lack of definition of reportable markets must be undertaken in accordance with point 1 of Chapter II / 2.2 of this instruction. Therefore it is the responsibility of the notifying parties to conduct and submit all the necessary information to the Competition Authority that the proposed concentration does not cause reason for reporting about the market. The Competition Authority will not apply the short-form procedure under section 1 (b) of Chapter II / 2.1, if it is difficult to conclude that the proposed concentration does not arise for reporting markets. In such cases, the Competition Authority can turn a normal procedure and consider the notification as incomplete in terms of material.

3.2 Publication of Facts and Notifications

The information will be published on the official website of the Competition Authority, after receiving the notification and shall include the names of the parties to the concentration, their country of origin, nature of the concentration and the economic sectors involved, as well as an indication that, according to information provided by the notifying party, the concentration may qualify for a short-form procedure. Interested parties will have the opportunity to submit their comments / observations, particularly in circumstances which may require conducting an investigation.

3.3 Short-form Decision

If the Competition Authority finds that the concentration meets the criteria for the short-form procedure under paragraphs 1 and 2 of Chapter II / 2.1, it will normally issue a final short-form decision. This includes those cases which do not cause any competition concern when depositing a full notification form. Concentration in this way will be declared compatible with the internal market, within 25 working days from the date of confirmation of the filing of the complete documentation of the notice. However, in the period up to 25 days, the possibility of returning to a normal procedure concentration in the first phase and the beginning of the investigation and / or approval of the decision to complete remains open to the Competition Authority, if it deems it appropriate to such action on the case. In such cases, the Commission may also consider short-form notification as incomplete if it does not take the form of a full notification.

3.4 Publication of Short-form Decisions

The Competition Authority will publish a notice in the Official Bulletin of the decision based on Article 26 "Publication of decisions". The public version of the decision will be available on the official website of the Competition Authority. The short-form decision will contain information about the notified concentration published in the Official Bulletin of the Competition Authority, at the time of notification (names of the parties, their country of origin, nature of economic sectors concentration and words) and a statement that the concentration has been declared compatible with the internal market because the notification is within the scope and object of this Directive.

IV. Ancillary Restrictions

Short-form procedure is not appropriate for cases in which the undertakings concerned require expressed appreciation of restrictions which are directly and specifically with the implementation of the concentration.